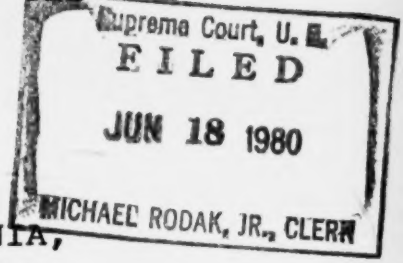
79-1998

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1979

No. 79-




PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ROBERT JOSEPH TERESINSKI,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF CALIFORNIA

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PEOPLE OF THE STATE OF CALIFORNIA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

## OPINIONS BELOW

The opinion of the California Supreme Court affirming an order of the Yolo County Superior Court dismissing a charge of robbery was filed on February 11, 1980, and is reported at 26 Cal.3d 457, 162 Cal.Rptr. 44, 605 P.2d 874. The

opinion is reproduced as Appendix "A". A timely petition for rehearing was thereafter filed in the California Supreme Court on February 26, 1980. That court filed an order denying rehearing on March 20, 1980. [1/]

## JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

Whether police officers can reasonably be expected to have the legal acumen necessary to unerringly resolve the complex issues involved in the interpretation and enforcement of California's juvenile curfew ordinances.

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1. The order of the California Supreme Court denying the petition for rehearing is reproduced as Appendix "B". The judgment of the California Supreme Court entered on March 21, 1980, is reproduced as Appendix "C".

Whether Officer Rocha has specific and articuable facts for suspecting a violation of Dixon's curfew ordinance by the juveniles he intended to stop.

Even assuming arguendo that Officer Rocha was mistaken in his belief that curfew ordinance had been violated, does his reasonable and good faith mistake of law render the detention unconstitutional.

Whether the majority opinion erred in finding that the victim's in-court identification was obtained by exploitation of the allegedly illegal detention.

Whether suppression of the physical and/or identification evidence in the instant case would serve any of the recognized purposes of the exclusionary rule.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth Amendment and Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

Following a preliminary hearing conducted on December 16, 1976, an information was filed in the Yolo County Superior Court by the district attorney on December 27, 1976. The information charged respondent, Robert Joseph Teresinski, and his co-defendant, Jimmy Wayne Kimbrough, with a violation of Penal Code section 211 (robbery) (CT 1). [2/]

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2. "CT" refers to the Clerk's Transcript on Appeal to the Supreme Court of the State of California, in Case No. Crim. 20497. If the Court so desires, petitioner will furnish said transcript upon request.

On December 30, 1976, respondent and his co-defendant appeared with separate counsel for arraignment and entered not guilty pleas. Their jury trial was set for February 15, 1977. At the arraignment respondent and his co-defendant made a motion to suppress evidence which was scheduled to be heard on January 17, 1977 (CT 108).

On December 30, 1976, respondent and his co-defendant appeared with separate counsel for arraignment and entered not guilty pleas. Their jury was set for February 15, 1977. At the arraignment respondent and his co-defendant made a motion to suppress evidence which was scheduled to be heard on January 17, 1977 (CT 108).

On January 17, 1977, an evidentiary hearing was conducted pursuant to

respondent's motion to suppress evidence. In addition re receiving the testimony of James Ney at the Penal Code § 1538.5 hearing, the preliminary hearing testimony of witnesses Larry Rocha and Colin Cady was also stipulated into evidence. After argument, the court ordered counsel to file briefs on the questions of whether the identification testimony of Colin Cady should or should not be suppressed. Counsel were to file their briefs by January 24, 1977 (CT 111).

The people filed points and authorities in opposition to respondent's motion to suppress on January 24, 1977 (CT 112-115).

Respondent's points and authorities were filed on January 28, 1977, and co-defendant Kimbrough also filed his on

January 28, 1977 (CT 116-118, 119-121).

On January 28, 1977, the court issued an order granting respondent's and co-defendant's motion to suppress (CT 123-130).

On February 7, 1977, the court dismissed the case against respondent pursuant to Penal Code section 1385 (CT 131).

On March 18, 1977, petitioner filed timely notice of appeal (CT 132). Petitioner also filed a request for additional record on appeal which was granted on March 22, 1977 (CT 133-134; 135).

On March 7, 1978, the Court of Appeal, Third Appellate District, reversed the order granting the motion to suppress and ordered the matter remanded to the trial court.

On April 5, 1978, respondent's petition for rehearing was denied.

On May 4, 1978, the California Supreme Court granted respondent's petition for hearing.

On October 4, 1978, the matter was orally argued in Sacramento.

## STATEMENT OF FACTS

### A. Preliminary Hearing Transcript

On the morning of December 3, 1976, Mr. Colin Cady was working as a clerk in the 7-11 Store at 301 Cottonwood Street in Woodland (CT 7-8).

At approximately 12:45 a.m., three men entered the store, looked around for awhile, purchased three sandwiches and left (CT 8).

About an hour later, these same three men returned to the store. Mr. Cady identified respondent, Robert

Joseph Teresinski, and his co-defendant, Jimmy Wayne Kimbrough, as being two of the men who entered the store on December 3, 1976.

Kimbrough walked toward the beverage cooler in the back of the store, opened it and took out a bottle (CT 9). Kimbrough then walked toward the front of the store and bumped into respondent, dropping the bottle. Mr. Cady came over to where the bottle had broken to help pick up the glass. As he bent over to do so, one of the men hit him on the head. Two of the men then carried Mr. Cady to the store's back room and taped his hands behind his back (CT 11).

The men then asked Cady how to open the store's cash register (CT 13).

While he was tied up, Mr. Cady

heard the sound of the cash register opening and then heard the bell which indicates that someone was entering or leaving the store. After he got loose, Mr. Cady checked the store and noticed that the cash drawer was almost empty. Before the robbery there had been almost $70 in the till (CT 14).

At approximately 2:50 a.m. on the morning of December 3, 1976, Police Officer Larry Rocha was on duty in the City of Dixon. Dixon is a small town in Solano County about 15 miles from Woodland (CT 59).

Officer Rocha noticed a maroon Chevrolet being driven through the commercial section of town (CT 87). Officer Rocha stopped the car because he thought its three occupants were all juveniles. The City of Dixon has a

10:00 p.m. curfew for juveniles. (CT 60). [3/]

As the car was pulling over, Officer Rocha saw the driver reach toward the glove compartment while glancing back at the police car. Officer Rocha also saw the passenger in the front seat reach down under the seat while looking back at the police car (CT 61).

Although Officer Rocha did not think these actions were illegal they did make him apprehensive (CT 68-69).

Officer Rocha pulled up behind respondent's car, stepped out and drew his back-up weapon because he feared

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3. Section 16.2 et seq. of the Dixon City Ordinance is set forth in the Slip Opinion of the California Supreme Court attached hereto as Appendix "A" at p. 4, n. 2.

for his own safety (CT 68).

Respondent, who was driving the car, got out and met Officer Rocha near the back of the car (CT 65).

Officer Rocha was familiar with most of the vehicles on the main street of Dixon at that hour but did not recognize the maroon Chevrolet (CT 87).

Officer Rocha examined respondent's driver's license and then checked the interior of the car to see if any of the passengers had alcohol in the car (CT 66).

Officer Rocha saw a pool of liquid coming out from under the driver's seat and saw that there was a beer can on the floor under the seat between the passenger's legs (CT 70).

Officer Rocha then walked to the passenger side of the car and asked the

person seated in the front seat to get out (CT 70).

As this person was getting out of the car, Officer Rocha saw a holster on the front seat (CT 72).

Officer Rocha again drew his gun and asked, "Where's the gun?" (CT 72).

Respondent replied, "Under the seat." (CT 72).

Officer Rocha instructed respondent to reach under the seat and get the weapon (CT 73). Officer Rocha then had the three occupants of the car lie on the sidewalk and he called for a backup unit.

After the backup unit arrived, Officer Rocha searched the interior of the car and found a baggie of green vegetable matter, a brown paper bag full of currency, change and food stamps,

and four full beer cans under the front seat (CT 74-76).

All three of the occupants of the vehicle were then arrested for investigation of robbery (CT 77).

When the Dixon Police inventoried the money in the bag, they found a roll of coins with a name, address and phone number on it (CT 82).

B. The Motion to Suppress Hearing

As previously noted, the preliminary hearing transcript was stipulated into evidence at the § 1538.5 hearing.

It was also stipulated that the three suspects were transported to Woodland after their arrest in Dixon and that their photographs were taken in Woodland and that these photographs were shown to the victim by Detective James Ney of the Woodland Police Department

as part of a photographic lineup.

Detective James Ney was the only witness called at the § 1538.5 hearing (RT 14).

Detective Ney received a phone call at home shortly after the robbery and went to the 7-11 Store to investigate. At the store, Mr. Cady gave Detective Ney a description of the robbery suspects (RT 15).

The Woodland Police also obtained a description of the car used by the robbers as being a 1969 maroon Chevrolet (RT 22).

At approximately 3:35 a.m. on December 3, 1976, Detective Ney was notified by radio that the Dixon Police had called to let them know that three people were in custody who fit the description of the suspects in the 7-11

robbery (RT 14-15). The car which these suspects were driving also fit the description of the car used by the robbers and evidence found in the car implicated the three suspects in the robbery (RT 19).

Detective Ney and Sergeant Troxel drove to Dixon later in the morning to take custody of the three suspects. Mr. Cady went with the officers to Dixon (RT 20).

In Dixon, Detective Ney was told that either Officer Rocha or Mollica had called the person in Woodland whose name was on the coin wrapper found in respondent's car and that this person had said he spent the coins in the 7-11 Store in Woodland (RT 19).

After they were brought back to Woodland, the three suspects were booked

into the county jail and their photographs were taken (RT 17).

Photographs of respondent and of Kimbrough were placed in a photographic lineup along with six other photographs (RT 17).

Mr. Cady identified both Teresinski and Kimbrough from the photographic lineup (RT 18).

## SUMMARY OF ARGUMENT

In December, 1976, respondent was arrested in Dixon, California, upon probable cause to believe that he had violated that municipality's juvenile curfew ordinance, whose validity had never been challenged. An incidental search revealed evidence linking him to the robbery of a convenience market in Woodland, California. Almost four years after the arrest, the California

Supreme Court held that the stop was unconstitutional and that its illegality dictated suppression of the evidence and consequently, a total dismissal of charges against respondent. The reasons given for the application of the exclusionary rule were to deter police misconduct.

We argue that no tenable purpose could possibly be served by the suppression of evidence in this case. It could not deter police misconduct, the prime purpose of the exclusionary rule, because there was no "misconduct" under any definition of that word. The arrest was based upon probable cause and the arresting officer reasonably and in good faith relied upon his understanding of the ordinance. The detrimental effect upon the vigorous and uniform enforcement

of the law is obvious and intolerable. We contend, therefore, that evidence found by police who reasonably and in good faith rely upon their understanding of a statute, rule or ordinance in making a stop, detention or arrest should not be suppressed.

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## ARGUMENT

### I

### UNERRING ENFORCEMENT AND INTER PRETATION OF CALIFORNIA'S JUVENILE CURFEW LAWS WOULD BE EXTREMELY DIFFICULT FOR EVEN THE MOST EXPERIENCED POLICE OFFICERS

At first blush, enforcement of a juvenile curfew ordinance may seem a simple task. As Officer Rocha has now learned, such is not the case. To insure the admissibility of evidence seized as part of a detention based on a suspected curfew violation, a police officer in California must now be an adroit legal scholar. The lesson taught by the instant case is that he clearly may not rely on his reasonable and good faith belief regarding the meaning of such ordinances.

To expect, as does the California Supreme Court, that a police officer

must be able to unerringly interpret and apply each and every statute or ordinance he is called upon to enforce defies reason.

The instant case involves a municipal juvenile curfew ordinance. However, the police are not able to select the laws they will be called upon to enforce and the rule announced by the California Supreme Court in the instant case requires that an officer, working in the field, be capable of making the most detailed and sophisticated legal analysis on pain of having evidence declared inadmissible because he has made a reasonable mistake of law.

As the briefing in this case graphically illustrates, the law surrounding California's juvenile curfew ordinance is extremely complex. For example, a municipality has a right to

pass a curfew ordinance, even one embodying severe restrictions, if an emergency was involved. (See United States v. Chalk (4th Cir. 1971) 441 F.2d 1277, 1280-1283; Glover v. District of Columbia (D.C. App. 1969) 250 A.2d 556, 560-561; Ervin v. State (1968) 41 Wis.2d 194, 199-202 [163 N.W.2d 207, 210-211]; Davis v. Justice Court (1970) 10 Cal.App.3d 1002, 1007-1011 [89 Cal.Rptr. 409].)

It is also a well established rule that municipalities have the power to pass a curfew law for the purpose of protecting juveniles or preventing delinquency (Bykosky v. Middletown (D.C.Pa. 1975) 401 F.Supp. 1242.)

In analyzing the difference between the various types of curfew laws, a California appellate court has noted that:

"Curfew statutes can be classified into two groups according to the conduct proscribed, i.e., 'presence' or 'loitering.' (Curfew Ordinances and the Control of Nocturnal Juvenile Crime, supra, 107 U.Pa.L.Rev. 66, 73.) Those proscribing 'presence' or 'being in' particular places have been held unconstitutional. (Alves v. Justice Court, supra, 148 Cal.App.2d 419; Ex parte McCarver (1898) 39 Tex.Crim. 448 [46 S.W. 936].) Those interpreted as only proscribing 'loitering' or 'remaining' have been held constitutional. (Thistlewood v. Ocean City, supra, 236 Md. 548 [204 A.2d 688]; Portland v. Goodwin (1949) 187 Ore 409 [210 P.2d 577] (applying to all persons); People v. Walton (1945) 70 Cal.App.2d Supp. 862 [161

P.2d 498].) Even those ordinances proscribing 'presence' may be reasonable if sufficient exceptions are included making it clear that mere 'presence' alone is not proscribed. (City of Eastlake v. Ruggiero, supra, 7 Ohio App.2d 212 [36 Ohio Ops. 345, 220 N.E.2d 126].)

"The rationale of those cases holding that ordinances proscribing 'presence' are unconstitutional is that they are unnecessarily broad. As the court noted in Alves v. Justice Court, supra, 148 Cal.App. 2d 419, 424-425: 'True, the ordinance would preclude aimless loitering by minors in public places during the hours set forth, but it would also make unlawful many other activities by minors which otherwise would be

entirely lawful.'

"By contrast, the ordinance in People v. Walton, supra, 70 Cal. App.2d Supp. 862, 864, proscribed remaining or loitering. The court noted at page 866: 'Such a provision is aimed then at preventing such minors from tarrying and staying unnecessarily upon the streets and public places, and does not restrict those minors who are using or are on such streets or places while actually in the process of going to or from places of business or amusement or otherwise.'" (In re Nancy C. (1972) 28 Cal.App.3d 755-756.)

California's juvenile curfew laws have been the subject of judicial decisions dating as far back as 1945. (People v. Walton (1945) 70 Cal.App.2d

Supp. 862.)

California's juvenile curfew laws were again the focus of an appellate court decision in 1971. Thus, in People v. Horton (1971) 14 Cal.App.3d 930, the court considered the question of whether an officer had probable cause to make a temporary detention under a municipal juvenile curfew ordinance. Horton dealt with the detention of a car containing an adult driver and two juveniles at about 1:15 a.m. in the City of Modesto. Modesto had an ordinance prohibiting juveniles from loitering upon the city streets after the hour of 11:00 p.m.[4/] Although the officers

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4. Section 4-7, p. 201 of the Modesto Municipal Code as discussed in People v. Horton, supra, provides: "it shall be unlawful for any minor under the age of 18 years to loiter on a public street or in or about (cont'd.)

said they stopped the car in Horton because they believed that there was a curfew violation, the Court of Appeal apparently did not feel that the officers had a subjective belief that the statute was being violated. (See In re Francis W. (1974) 42 Cal.App.3d 892, 901).

In Horton, supra, the only reason given for stopping the car was that the officer suspected that defendant was not old enough to be either a parent or guardian of his passengers and that he was, thus, aiding and abetting them to loiter in violation of a municipal

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Footnote 4 continued.

any public place in the City between the hours of 11 o'clock P.M. and 5 o'clock A.M. . . . unless accompanied by a parent, guardian, or other adult person having legal control. . . . "

ordinance. However, the only evidence that indicated loitering was the actual driving of a car in the streets of Modesto at 1:15 a.m. The court in Horton disapproved of the detention noting that "driving along city streets, even at 1:15 in the morning, is not 'loitering.'" (Id. at 933.) Later in the opinion, it was stated that the detention of a vehicle simply because it contained three young people cannot be condoned because to do so would be to create a "second-class citizenry." (Id. at 934.)

In 1972 the California Court of Appeal, Third Appellate District, decided a case involving Sacramento's juvenile curfew law.

In In re Nancy C. (1972) 28 Cal.App.3d 747, two Sacramento police

officers observed a female who appeared to be a minor walking east on S Street between 3rd and 4th Streets at 10:00 p.m., on June 19, 1971. The area bounded by 3rd and 5th, and S and T Streets was a high prostitution area. One of the officers suspected the juvenile of being a prostitute and described her walk as "a prostitute stroll." The officers drove around the block, and stopped in the vicinity of 5th and R Streets at approximately 10:10 p.m. and questioned the minor. They ascertained that her name was Nancy C. and that she was in fact under age. She indicated to the officers that she was coming from the River Club (which does not permit persons under 21), and that she had been staying with one Kathy Pittman, who was known to one officer as a prostitute.

Finally, she said that she was on her way to the Greyhound Bus Depot to meet a friend.

The minor was arrested for violation of curfew ordinance[5/] and was booked at city jail. During the booking her purse was searched and a bag appearing to contain marijuana was discovered. At trial it was stipulated that the bag did contain marijuana.

On appeal, the juvenile argued that the ordinance violated article I, section 1, of the California Constitution and the Fourteenth Amendment of the United States Constitution in that it

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5. The Sacramento juvenile curfew ordinance which was upheld against constitutional attack in In re Nancy C., supra, is amazingly similar to the Dixon ordinance. The Sacramento ordinance is set forth at page 752 of the opinion in Nancy C.

unreasonably interfered with the exercize of personal rights guaranteed by these provisions by being too broad and discriminatory.

In rejecting these arguments, the court specifically held that:

> "It is well settled, however, that juveniles may be reasonably classified differently from adults since '[T]he law has long recognized the validity of classifications based upon age.' (Ames v. City of Hermosa Beach, 16 Cal.App.3d 146, 153 [93 Cal.Rptr. 786].) Moreover it has been specifically held that curfew regulations of minors is one such reasonable classification. (See People v. Walton, supra, 70 Cal.App.2d Supp. 862.)" (28 Cal.App.3d at 757.)

Relying on Alves v. Justice

Court (1957) 148 Cal.App.2d 419, 423-424, the court in Nancy C., supra, held that:

> "The constitutional standard to be applied when an ordinance such as this is attacked as unduly restrictive of personal rights is one of 'unreasonableness.'" (28 Cal.App.3d at 754.)

In applying this reasonableness test, the court balanced the gravity of the evil to be corrected with the importance of the right invaded.

With respect to the importance of the right being invaded by a juvenile curfew law, the court noted that:

> "Commentators have suggested that 'the interest of children in being abroad during the night hours is not nearly so important to the social,

economic and healthful well-being of the community,' as the free movement of adults. (Curfew Ordinances and the Control of Nocturnal juvenile Crime, supra, 107 U.Pa.L.Rev. 66, 99.) In addition, the community has a special interest in 'the protection of children of immature years.' (In re Weber (1906) 149 Cal. 392, 395 [86 P. 809].) Furthermore, the community has an interest in the reduction of juvenile nocturnal crime. Thus, 'curfew ordinances for minors are justified as necessary police regulations to control the presence of juveniles in public places at nighttime with the attendant risk of mischief, and . . . such ordinances promote the safety and good order of the community by

reducing the incidence of juvenile criminal activity.' (City of Eastlake v. Ruggiero (1966) 7 Ohio App.2d 212 [36 Ohio Ops.2d 345, 220 N.E.2d 126 at p. 128].)' (28 Cal.App.3d at 754.)

The court in Nancy C. went on to determine whether the operative language of the Sacramento Ordinance was so broad as to be unreasonable when measured against these interests.

In doing so the court considered the meaning of the words "wander, stroll, idle and/or play" and said:

"Although the word 'loitering' as used in a criminal statute has been held to connote a sinister or wrongful purpose (In re Cregler, 56 Cal.2d 308 [14 Cal.Rptr. 289, 363 P.2d 305]; People v. Caylor,

6 Cal.App.3d 51 [85 Cal.Rptr. 497]) it is obvious that the words 'loiter, wander and idle' are not used in the Sacramento Curfew Ordinance in this restrictive, sinister sense. This is clear because the conduct described by these words used in their sinister sense is already proscribed by Penal Code section 647, subdivision (e). Furthermore, the words 'stroll or play' do not have any sinister connotations, and their juxtaposition to the words 'loiter, idle, wander' clearly connotes an innocent purpose." (28 Cal.App.3d at p. 755.)

Even though the use of these terms in their broad everyday meaning might be unreasonable if applied to all persons, the court in Nancy C. nevertheless held that the Sacramento

Ordinance was valid because it was a loitering statute directed solely at minors.

Based on this extensive and authoritative analysis, the court considered the following factors in arriving at its decision:

1. The Sacramento Ordinance although admittedly somewhat broader than the one in Walton, supra, is still a loitering type ordinance rather than a "presence" type ordinance because the words taken together and used in their ordinary sense prohibit tarrying and remaining in place and not merely being present;

2. The ordinance in question is not applicable to all persons but only to minors under 18 years of age;

3. The ordinance in question has

reasonable and comprehensible exceptions.

These factors led the court in In re Nancy C. to the inescapable conclusion that:

> ". . . the ordinance is constitutional. The evil to be prevented is danger to children and the incidence of juvenile crime during the nighttime hours. To forbid juveniles from loitering in the streets during nighttime hours has a real and substantial relationship to the dual goal of protection of children and the community, and the ordinance in question does not unduly restrict the rights of minors in view of these interests." (28 Cal.App.3d at p. 758.)

In 1974 another case involving a

juvenile curfew law was decided, In re Francis W. (1974) 42 Cal.App.3d 832.

Like Horton, In re Francis W. dealt with the late night stop of a car based on a suspected violation of a municipality's curfew law.

However, the same court which had earlier decided Horton distinguished that case from the facts in In re Francis W. and found the stop in Francis W. to be lawful.

The court in In re Francis W. held the facts of that case to be distinguishable from those presented in Horton because:

> "The Merced municipal ordinance in the case at bench is broad enough to prohibit the minors from appearing 'on any street, square or public

place' at night, whether in a car or not; thus the officer's suspicion of criminal activity by the occupants of the vehicle, that is, violating the ordinance, was reasonable. Further, as distinguished from Horton the officer here had the subjective belief that the ordinance was being violated and believed that all three of the occupants were under 18 and in violation of the ordinance.[6/]

An examination of cases such as

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6. In In re Francis W., supra, the court noted that section 17.21 of the Merced City Code provided in pertinent part that: "It shall be unlawful for any minor under the age of eighteen years to be or appear on any street, square or public place in the city between the hours of 10:00 P.M. of any day and 6:00 A.M. of the following morning . . . (Ord. No. 347, § 1; Ord. No. 784, § 1.)" 42 Cal.App.3d at 900-901.

Nancy C., Horton and Francis W. clearly demonstrates that it is unreasonable to expect a police officer to be able to unerringly resolve the sophisticated legal questions involved in the interpretation and/or enforcement of juvenile curfew statutes.

In reply, it may well be argued that rather than expecting officers to possess the legal acumen necessary to resolve such questions, the officers are only expected to seek advice from their legal advisors such as the district attorney, city attorney or county counsel. This reply is based on a faulty premise. Thus, such an argument assumes that the officer is aware of his own deficiencies and recognizes the legal issues upon which he needs additional education. Furthermore, the

spontaneous demands of law enforcement do not always permit the luxury of consultation and academic discourse on legal questions arising during the performance of an officer's duties.

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II

OFFICER ROCHA HAD A SPECIFIC AND ARTICULABLE FACTUAL BASIS FOR SUSPECTING THAT CRIMINAL ACTIVITY WAS TAKING PLACE AND THAT THE JUVENILES HE INTENDED TO STOP WERE INVOLVED IN THAT ACTIVITY

The majority opinion in the instant case incorrectly states that petitioner concedes that respondent's conduct did not violate the Dixon City curfew ordinance (Slip Opn. p. 5.)

In briefs filed in the Court of Appeal and in the California Supreme Court, petitioner consistently argued that Officer Rocha had probable cause to believe that the Dixon Ordinance was being violated when he stopped respondent's car.[7/]

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7. As counsel for petitioner indicated at oral argument, the question of whether respondent had actually (cont'd.)

Similarly, at oral argument before the California Supreme Court, petitioner'a counsel once again advanced this contention while being questioned by Mr. Justice Tobriner. As will be shown, a claim that petitioner concedes that Officer Rocha did not have probable cause to temporarily detain respondent's car seriously misstates petitioner's arguments.

A. The Majority Opinion Incorrectly States That The Plain Language Of The Dixon Curfew Ordinance Does Not Prohibit A Minor From Spmply Being Present On The Streets Of Dixon After 10 P.M.

It is immediately apparent that

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Footnote 7 continued.

violated the curfew ordinance is not presented by this case since respondent was not arrested on this charge nor was he ever charged with a curfew violation.

the majority opinion misreads and misinterprets the Dixon City ordinance under which respondent was stopped.

Throughout his testimony in the trial court, Officer Rocha referred only to the curfew law of his city. It was not until argument by respondent's codefendant's counsel that the word "loiter" first appeared, and then it appeared only as a quotation from People v. Horton, supra, 14 Cal. App.3d 930. However, in reaching his decision on the suppression motion, the trial judge focused on the word "loiter":

> "Considering the foregoing facts, the court reaches the following conclusion:
>
> "1. The vehicle was illegally stopped by the Dixon police officer.

The Dixon police officer mistakingly [sic] believed that the curfew ordinance prohibited juveniles from being out during certain hours. Actually, the ordinance only prohibited 'loitering' during such times. It is at once apparent that the subject individuals, even if juveniles, could not have been loitering by being occupants of a moving vehicle. The Dixon officer therefore improperly stopped this vehicle under the mistaken belief that there was a possible violation of the juvenile curfew ordinance; such was not possible under the circumstances (see People v. Horton, 14 Cal. App.3d 930.)" (CT 126-127).

The full text of the Dixon

ordinance is given in the margin of the majority opinion (Slip. Opn., p. 4, n.2), and shows that its operative words include "loiter," "idle," "wander," "stroll," and "play." While "loiter" has been given a legal definition in California that connotes sinister activity In re Cregler (1961) 56 Cal.App.2d 308, 312), it has already been shown that the other four terms have no special legal overtones and are not used in this restrictive, sinister sense. Looking to a traditional authority, the Merriam-Webster Third New International Dictionary, two of the words have meanings that do not restrict their application to pedestrian traffic:

idle -to lose or spend time in idleness, especially to move idly

-to spend (as time) in idleness

wander -to move about without a fixed course, aim, or goal (wander about the world)

-to go idly about for pleasure or relaxation

-to travel, especially slowly by a devious or indirect route

-to take a slow winding course.

The Dixon ordinance clearly expresses the intent of the legislative branch of the city to cover all activities of juveniles during the specified hours. The words "in or upon" imply more than foot traffic. Any ambiguity is clarified by referring to the section

heading of the Dixon ordinance. "Sec. 16.2 Curfew--Minors not to be in public after 10:00 p.m.; exceptions." This portion of the ordinance clearly leaves no doubt that this ordinance is akin to that of In re Francis W. (1974) 42 Cal.App.3d 892, fn. 3, 900-901, in covering juvenile vehicular as well as juvenile pedestrian traffic.

> "In the construction of statutes where there is doubt or ambiguity, it is settled law in this state that resort may be had to the title and section headings. 23 Cal.Jur. sec. 145, p. 770; sec. 147, pp. 772-773. They are not conclusive by any means, but are legitimate aids in arriving at the legislative intent . . . " (Aebli v. Board of Education (1978) 62 Cal.App.2d 706, 738.)

The majority's error in believing that the Dixon ordinance covered only loitering led the Court to mistakenly apply the rule of People v. Horton, supra, 14 Cal.App.3d 930, rather than the rule of Francis W. This error in turn led the court to conclude that as a matter of constitutional law, the detention was unlawful. Since all juveniles are covered by the Dixon curfew ordinance, Officer Rocha was not mistaken as to the law. It follows that his stop of respondent's vehicle, based on the officer's good faith belief that a misdemeanor was being committed in his presence, was legal. The trial judge and the California Supreme Court erred in holding otherwise.

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B. Officer Rocha Had Probable Cause To Believe That Respondent Was Violating The Dixon Curfew Ordinance.

In People v. Mickelson (1963) 59 Cal.2d 448, 450, the California Supreme Court clearly established the rule that under the Fourth Amendment circumstances short of probable cause to arrest may still justify an officer's stopping pedestrians or motorists on the street for questioning. The right of an officer to detain a suspect has been measured under the following tests: (1) the circumstances are such as to indicate to a reasonable man that detention is necessary to the proper discharge of an officer's duties; (2) the officer can point to specific and articulated facts which taken together with rational inferences warrant a detention; and (3) a hunch or suspicion

is inadequate unless there is some suggestion that it is related to ciminality.

In Williams v. Superior Court (1969) 274 Cal.App.2d 709, 711-712, the court summarized the applicable rule as follows:

> "Thus, although circumstances short of probable cause to arrest may justify an officer's act in stopping and temporarily detaining a motorist or pedestrian for questioning, there must be some suspicious or unusual circumstance to justify even this limited invasion of a citizen's privacy. Generally, the test is whether the circumstances are such as to indicate to a reasonable man in a like position that such a course is necessary to the proper discharge of the officer's duties."

In explaining this rule, the court in People v. Courtney (1970) 11 Cal. App.3d 1185, 1189-1190, said that:

"The rationale of all these decisions is that an officer of the law, employed to maintain the peace and to prevent crime, as well as to apprehend criminals after the fact, has both the right and the duty to make reasonable investigation of all suspicious activities even though the nature thereof may fall short of grounds sufficient to justify an arrest or a search of the persons or the effects of the suspects. Experienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety

of law-abiding citizens. The benefit thereof should not be lost because the cold record before a reviewing court does not contain all the particularized perceptions which may have been so meaningful at the scene."

It has also been held permissible to stop minors to inquire of their ages when no adult is present. (Pendergraft v. Superior Court (1971) 15 Cal.App.3d 237; People v. Bloom (1969) 270 Cal.App.2d 731, 735.)

These rules were reiterated in In re Tony C. (1978) 21 Cal.3d 888, 893, where the California Supreme Court held that under the Fourth Amendment:

". . . to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable

facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation omitted], to suspect the same criminal activity and the same involvement by the person in question."

Petitioner does not contest the majority's statement of the constitutional standard to be applied to the

instant case to determine whether Officer Rocha's temporary detention was lawful. (Terry v. Ohio (1968) 392 U.S. 1, 22; In re Tony C., supra, 21 CA1.3d 888.)

Where petitioner parts company with the majority and where the majority parts company with Fourth Amendment precedent is in the application of the facts to the rules governing temporary detentions.

In the instant case, the facts clearly indicate that Officer Rocha had probable cause to make the stop.

Thus, at approximately 2:00 a.m. in the morning, Police Officer Larry Rocha was on duty in the City of Dixon. Dixon is a small town in Solano County about 15 miles from Woodland (CT 59).

Officer Rocha noticed a maroon

Chevrolet being driven through the town's small, closed commercial district (CT 87).

Officer Rocha was familiar with most of the vehicles on the main street of Dixon at that hour but did not recognize the maroon Chevrolet (CT 87). Officer Rocha stopped the car because he thought its three occupants were all juveniles. Based upon this belief that it was probable that a curfew violation had occurred, the officer stopped the vehicle. Under the principles noted above, it is submitted that this detention was a lawful and appropriate discharge of the officer's duties.

This does not end the analysis, however. As will be shown in the next section, petitioner asserts that even if Officer Rocha was mistaken in his

belief that the local ordinance had been violated, his initial detention and subsequent search of respondent's car did not violate the Fourth Amendment since Officer Rocha made a good faith and reasonable mistake of law.

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III

EVEN ASSUMING ARGUENDO THAT OFFICER ROCHA WAS MISTAKEN IN HIS BELIEF THAT THE CURFEW ORDINANCE HAD BEEN VIOLATED, HIS GOOD FAITH MISTAKE OF LAW DOES NOT RENDER THE DETENTION UNLAWFUL

The Fourth Amendment, made applicable to the States by force of the Due Process Clause of the Fourteenth Amendment (Mapp v. Ohio (1961) 367 U.S. 643; Wolfe v. Colorado (1949) 338 U.S. 25, provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or

things to be seized."

The plain language of that amendment is aimed at and is intended to guide executive officers who conduct searches and seizures in the course of "the often competitive enterprises of ferreting out crime" (Johnson v. United States (1948) 333 U.S. 10, 14), and neutral and detached judicial officers (Shadwick v. City of Tampa (1972) 407 U.S. 345; Coolidge v. New Hampshire (1971) 403 U.S. 443, 449-453), who may issue warrants only upon a showing of probable cause. (United States v. Harris (1971) 403 U.S. 573; Spinelli v. United States (1969) 393 U.S. 410; Aguilar v. Texas (1964) 378 U.S. 108.)

The Fourth Amendment was adopted in response to the Colonial experience

with arbitrary and unjustified searches pursuant to warrants issued without probable cause. (See Weeks v. United States (1914) 232 U.S. 383, 389-391; Boyd v. United States (1886) 116 U.S. 616, 624-630.) For that reason, the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." (Schmerber v. California (1966) 384 U.S. 757, 767.) "The security of one's privacy against arbitrary intrusion by the police" "is at the core of the Fourth Amendment" and "basic to a free society." (Wolfe v. Colorado, supra, 338 U.S. at 27 (emphasis added). Simply put, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."

(Katz v. United States (1967) 389 U.S. 347, 359.) One respected commentator has postulated that "the regulation of police behavior is what the Fourth Amendment is all about." (Amsterdam, Perspective on the Fourth Amendment, 58 Minn. L.Rev. 348, 369 (1974).)

We submit that both the language and purpose of the Fourth Amendment lead inevitably to the conclusion that it cannot be violated where an officer makes a temporary detention based on a reasonable and good faith mistake of law.

The first essential of probable cause for arrest is the police officer's subjective belief that a criminal offense is being committed in his presence.

The next consideration is whether

the facts available to the officer at the moment of the arrest would "warrant a man of 'reasonable caution' in concluding that an offense has been committed." (Ibid.) However, it has already been shown that circumstances short of probable cause to arrest may still justify an officer's detention of pedestrians or motorists in public areas for inquiry and further investigation. (People v. Mickelson, supra, 59 Cal. 2d 448; People v. Courtney, supra, 11 Cal.App.3d 1185; Williams v. Superior Court, supra, 274 Cal.App. 2d 709.)

Application of the foregoing principles relating to constitutionally permissible detentions makes it immediately apparent that a correct assessment of the effects, if any, of Officer

Rocha's mistaken interpretation of Dixon's curfew statute is that respondent's Fourth Amendment rights were not violated. Once the officer's subjective belief can be established, the ensuing inquiry is not whether, in the abstract the officer correctly interpreted the curfew statute, but whether a reasonable person, in the officer's position at the time and place in question, would have had a good belief that the curfew ordinance was being violated.

Two cases which have interpreted curfew statutes, and more specifically the word "loiter" contained therein, in the constitutional context (In re Cregler, supra, and In re Hoffman, supra) have found it constitutionally deficient unless interpreted so as to involve "sinister or wrongful"

connotations; they were concerned with substantive law, not with probable cause in the search and seizure context. The California Supreme Court in its appellate aerie and at its academic leisure, has no difficulty in concluding that the Dixon curfew law literally does not forbid the presence of minors in a moving vehicle at 2 a.m. But it does not follow that a Dixon police officer in the position of Rocha comes to the same conclusion. He is neither a judge nor a lawyer.[8/] While lawyers and judges have little or no difficulty in politely and endlessly arguing in the

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8. "[Courts have reasoned] that the mentality of the average policemen, whose life is traditionally not a happy one, should not be charged with the decisions of questions which baffle the best lawyers in the land." (Prosser, Torts (4th Ed.) p. 128.)

courtroom whether a local curfew law literally forbids the presence of minors in a moving vehicle at 3:00 a.m., Officer Rocha is not afforded this luxury.

Nor is he necessarily enough of a scholar to readily comprehend that "to loiter, idle, wander, stroll, play in or upon a public street" excludes such activity when performed by the occupants of a motor vehicle. His forte is and should be law enforcement, not academia.

Therefore, it was error for the California Supreme Court to judicially interpret the curfew statute and thereafter to conclude ipse dixit that Rocha lacked probable cause to detain simply because of his different interpretation; the court failed to determine the reasonableness vel non of Rocha's

interpretation, tested by the standard of the reasonably intelligent, reasonably well trained, and reasonably prudent police officer under all the circumstances.

The conclusion that a reasonable mistake of law does not offend the Fourth Amendment finds support in Hill v. California (1971) 401 U.S. 797. In Hill, this Court upheld a California Supreme Court ruling that "[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." (See People v. Hill (1968) 69 Cal.2d 550, 553.)

Although the Hill cases, and others dealing with this subject (see Witkin, Cal. Evidence (2d Ed. 1966)

§ 113, pp. 112-113), involve mistakes of fact, this Court has observed that Fourth Amendment standards for arrests and searches are to be "judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act,' Brinegar v. United States, 338 U.S. 160, 175 . . . (1949) . . . . " (401 U.S. at pp. 804-805.) (Emphasis added.)

In Elder v. Bd. of Medical Examiners (1966) 241 Cal.App.2d 246, a nurse was arrested for prescribing drugs without a certificate, in violation of Business and Professions Code section 2141. Incident to the arrest, the records of the doctor for whom she worked were searched, resulting in the revocation of his license to practice

medicine. In an administrative mandamus proceeding, the superior court ordered the revocation vacated on the ground that the nurse's arrest was illegal, hence the search was invalid. The Court of Appeal reversed, noting that although another section of the code, section 4229, "was subject to the construction [which was followed by the municipal court in the action against the nurse] that since petitioner could have originally authorized a refill, and since, if present, he could have orally authorized a refill, it was proper for the nurse to orally authorize a refill pursuant to the instructions given her before his departure. Nevertheless, there was no precedent so construing the statutes, nor does it appear that the authorities knew or had

reason to believe that all of the dangerous drugs furnished by authorization of the nurse were for refilled prescriptions. (See Randle v. California State Board of Pharmacy (1966) 240 Cal.App.2d 254, 258-260 [49 Cal.Rptr. 485]. [PP] On the record, therefore, there is nothing to sustain any implication from the trial court's finding that the filing of the complaint and the issuance and execution of a warrant against the nurse was other than bona fide. The arrest being valid the search attendant thereto was lawful." (241 Cal.App.2d at p. 263.) (Emphasis added.) Since the court's discussion of mistake of fact (whether the drugs furnished by the nurse were for refilled prescriptions) depends entirely upon a prior mistake of law (the scope of

§ 4229), the Elder case undeniably stands for the proposition that an arrest can be valid despite a good faith mistake of law. The court impliedly found the mistake reasonable on the ground that "there was no precedent so construing the statutes."

Similarly in People v. Superior Court (York) (1970) 3 Cal.App.3d 648 the court held that under the Fourth Amendment an officer's reasonable good faith belief that a landlord has the authority to consent to the search of a tenant's room is sufficient and that the officer need not file a quiet title action to be sure the landlord has the legal right to consent to such a search.

Drawing a distinction in the search and seizure area between mistakes of

fact and mistakes of law would not be warranted. Clearly, an officer's mistake of fact is just as instrusive on privacy rights as his mistake of law. Regardless of whether an officer makes a mistake of law or fact, the Fourth Amendment is not threatened where the officer acts in subjective good faith and where his good faith is objectively reasonable. The ability of the courts to ultimately judge the reasonableness of a given mistake of law is sufficient guarantee that willful, or even foolish (hence not reasonable) mistakes of law will not validate otherwise invalid searches, detentions, and arrests.

Respondent therefore submits that even if Officer Rocha was mistaken in his belief that the local ordinance had been violated, his initial detention

and subsequent search of the car in which respondent was riding were nevertheless reasonable and lawful.

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## IV

## THE MAJORITY OPINION IS CONTRARY TO PRECEDENT IN FINDING THAT THE VICTIM'S IN-COURT IDENTIFICATION WAS OBTAINED BY EXPLOITATION OF THE ALLEGEDLY ILLEGAL DETENTION

In addition to suppressing the physical evidence found in respondent's car, the majority opinion also holds that the victim's in-court identification must be suppressed as an exploitation of the allegedly unlawful detention. It is petitioner's contention that the majority opinion misstates the factual record in this case in arriving at this decision as well as ignoring well-established precedent.

There is direct support for this contention in the recent case of United States v. Crews (1980) ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed. ____.

In Crews, this Court held that an in-court identification need not be suppressed as the fruit of an unlawful arrest where the police's knowledge of the suspect's identity and the victim's independent recollections of him both antedate the unlawful arrest and were thus untainted by the constitutional violation.

Crews involved a situation where a victim notified the police after a robbery and gave them a full description of her assailant. Several days later, Crews, who matched the suspect's description, was seen by the police around the scene of the crime. After the police made an unsuccessful attempt to photograph him, Crews was taken into custody, ostensibly as a suspected truant from school, and was detained at

police headquarters, where he was briefly questioned, photographed, and then released. Thereafter, the victim identified his photograph as that of her assailant. Crews was again taken into custody and at a court-ordered lineup was identified by the victim. He was then indicted for armed robbery and other offenses. Crews made a pretrial motion to suppress all identification testimony and the trial court found his initial detention at the police station constituted an arrest without probable cause and accordingly ruled that the products of that arrest--the photographic and lineup identifications--could not be introduced at trial, but further held that the victim's ability to identify him in court was based upon independent recollection untainted by

the intervening identifications and that therefore such testimony was admissible. At trial, the victim once more identified Crews as her assailant. He was convicted of armed robbery but the District of Columbia Court of Appeals reversed, holding that the in-court identification testimony should have been excluded as a product of the violation of respondent's Fourth Amendment rights.

In reversing the Appellate Court, this Court affirmed the conviction on the ground that the victim's in-court identification was not obtained as an exploitation of the illegal arrest because the victim's identity was not discovered or her cooperation secured as a result of the arrest, nor did the arrest infect the victim's ability to

give accurate identification testimony.

The facts in the instant case are closely analogous to those in Crews.

For example, the Woodland Police knew of the robbery; they knew of Mr. Cady's ability to identify the robbers and their car; and they knew of the victim's whereabouts. They knew all of this before Officer Rocha of the Dixon Police Department stopped the car in which respondent was riding.

Furthermore, Officer Rocha was not aware of the 7-11 robbery when he stopped the car in which respondent was riding.

Finally, the allegedly illegal stop of the car was made as part of Officer Rocha's investigation into the suspected curfew violation which was a totally unrelated crime to the robbery.

Officer Rocha's subsequent search was not directed to discovering any witnesses or loot from the 7-11 robbery.

Thus, in the instant case the primary illegality, if any, was Officer Rocha's initial stop of Teresinski's car for a curfew violation. However, when he stopped Teresinski's car, Officer Rocha knew nothing of the Woodland robbery. It was pure happenstance that Officer Rocha later discovered evidence which caused him to believe that respondent had been involved in a crime other than a mere curfew violation or having an open container in the car. It was only after Officer Rocha found a pistol and a sack full of money in Teresinski's car that he even suspected that respondent had been involved in a crime

other than the one for which he had been stopped.

Even at this point, however, Officer Rocha still did not know anything about the Woodland robbery but instead merely suspected that respondent had been involved in some robbery because of the gun and the money in the car.

The instant case does, contrary to the majority's determination, involve independent agencies investigating different crimes. Here, the Woodland police were investigating a robbery while Officer Rocha of the Dixon Police Department was investigating a curfew violation. The instant case also involves the fortuitous discovery of evidence implicating respondent in the commission of a crime totally unrelated

to the offense for which Officer Rocha initially detained him.

Thus, there is nothing about Mr. Cady's ability to identify respondent in court as one of the robbers which exploits the illegality of Officer Rocha's temporary detention since these events have no relationship to one another.

However, it is true that the police would not have learned respondent's name, but for Officer Rocha's initial illegal detention.

The mere fact that police learned respondent's name as a result of Officer Rocha's initial detention is of little legal moment.

Thus, in People v. Fitzgerald (1972) 29 Cal.App.2d 296, the Los Angeles Sheriff's Office had obtained a warrant

for Fitzgerald's arrest on murder charges on October 8, 1969. One day later, the city police arrested Fitzgerald on an unrelated charge but Fitzgerald told the police his name was Joe Burton. After his arrest, the police learned of his true identity through fingerprints and he was then booked on the murder charge by the sheriff's office. Fitzgerald claimed that the fingerprints taken by the police which revealed his true identity were the tainted fruit of an illegal arrest and should have been suppressed.

The court held that even if the defendant had been unlawfully arrested by the police, there was no exploitation of any illegal activity since the sheriff's office could lawfully arrest and book Mr. Fitzgerald once his true

identity became known. It is important to note that in this situation, Fitzgerald's true identity would not have come to the attention of the sheriff's office "but for" the unlawfully obtained fingerprint evidence. The court nevertheless held that there was no requirement that the identification evidence be suppressed even if the sheriff's office had learned of it as a result of an unlawful arrest.

The fact that the police happened to learn of respondent's possible involvement in a crime other than that for which Officer Rocha initially stopped him is the sailient fact which brings the instant case within the so-called McInnis-Lockridge[9/] rule.

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9. People v. McInnis (1972) 6 Cal.3d 821, cert. den. 409 U.S. 1061; Lockridge v. Superior Court (1970) 3 Cal.3d 166.

The fact that the police would not have been able to make this connection but for the initial illegal detention is immaterial.

As the court noted in People v. Griffin (1976) 59 Cal.App.3d 532, the purposes of the exclusionary rule will be adequately served by the suppression of the physical evidence found in Teresinski's car.

Griffin, supra, involved the prosecution for an armed robbery which occurred on April 21 in El Segundo, California. Six weeks later Los Angeles City Police Officers arrested the defendant for possession of drugs and seized a number of barbiturates which were later identified as having been taken from the El Segundo robbery.

On May 8 the Los Angeles Police

informed El Segundo Police of the arrest and sent them defendant's "mug" shots.

The mug shot taken as a result of this illegal arrest was later identified by one of the victims of the earlier robbery.

At the 1538.5 hearing in Griffin, the People conceded that the entry, search and seizure of the controlled substances and defendant's arrest were unlawful. However, in addition to suppressing the narcotics, the trial court also suppressed all identification testimony by any and all witnesses resulting from the illegal arrest.

The Appellate Court reversed the trial court's order suppressing the identification testimony.

The factors which led the Appellate

Court to apply the happenstance rule in Griffin were:

(1) The El Segundo Police knew of the robbery and knew the identity and whereabouts of the witnesses to that robbery before Los Angeles Police arrested Griffin.

(2) The Los Angeles Police were unaware of the El Segundo robbery when they arrested Griffin.

(3) The illegal search and seizure were made as part of an investigation into an unrelated crime and the search was not directed toward the discovery of any witnesses or loot from the El Segundo robbery.

It has already been shown that each of the factors present in Griffin are present here.

Furthermore, it is also a well-

established rule that an illegal search or arrest in the investigation of an offense does not bar subsequent prosecution on that offense which utilizes lawfully obtained evidence. In the instant case this means that the police are not required to ignore forever the fact that Mr. Cady can identify respondent as one of the people who robbed him simply because they came by this knowledge as a result of an unlawful detention. (Fogg v. Superior Court (1971) 21 Cal.App.3d 1; see also Davis v. Mississippi (1968) 394 U.S. 721, 730 (Stewart, J. dissenting.)

Neither respondent's name, his mug shot, the officers' observations of respondent's appearance, nor their conclusions that he matched the description of one of the suspects are of any

independent evidentiary value in the instant case. (People v. Kanos (1969) 70 Cal.2d 381, 386.) Here, it is Mr. Cady's ability to identify respondent which is of evidentiary value.

A defendant's rights are not violated by requiring him to be present in court where his appearance may be observed by witnesses. It is also questionable whether a person has a reasonable expectation of privacy in their appearance, especially when their facial features are easily and continuously observed by the public.

Petitioner submits that the California Supreme Court's decision that Mr. Cady's in-court identification must be suppressed as an exploitation of the allegedly illegal detention lacks both factual and legal support and the

trial court's order must therefore be reversed.

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V

NO RECOGNIZED PURPOSE OF THE EXCLUSIONARY RULE WOULD BE SERVED BY EXCLUSION OF THE PHYSICAL AND/OR IDENTIFICATION EVIDENCE

It appears from the foregoing that the temporary detention of respondent was made with probable cause and in good faith. Thus, if the stop is declared unconstitutional we are confronted with a legal anomaly: A temporary detention which is entirely reasonable but technically unlawful, because of a reasonable mistake of law. But "a search not expressly authorized by state law [may] be justified as a constitutionally reasonable one." (Cooper v. California (1967) 386 U.S. 58, 61.) We must now inquire whether an officer's good faith and reasonable mistake of law compels the

application of the exclusionary rule to the evidence found in respondent's car.

The exclusionary rule has been justified on three grounds. (See Note, The Fourth Amendment Exclusionary Rule: Past, Present, No Future (1975) 12 Amer.Crim.L.Rev. 507, 508-512.) First, to vindicate his right to privacy, the accused had a personal constitutional right to exclude evidence obtained as a result of unlawful searches and seizures directed against him. (See Mapp v. Ohio, supra, 367 U.S. 643, 655-656; Weeks v. United States, supra, 232 U.S. 383, 392-394; Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement (1974) 59 Minn.L.Rev. 251.)

Second, exclusion of unlawfully

seized evidence is necessary to deter police misconduct. (Brown v. Illinois (1975) 422 U.S. 590; United States v. Peltier (1975) 422 U.S. 531; Michigan v. Tucker (1974) 417 U.S. 433, 446; United States v. Calandra (1974) 414 U.S. 338, 347; Bivens v. Six Unknown Federal Narcotics Agents (1971) 403 U.S. 388, 413-415 (Burger, C.J., dissenting); Kaufman v. United States (1969) 394 U.S. 217, 238 (Black, J., dissenting); Desist v. United States (1969) 394 U.S. 244, 249-250, 251; Linkletter v. Walker (1965) 381 U.S. 618, 636-637; Mapp v. Ohio, supra, 367 U.S. at 656; Elkins v. United States (1960) 364 U.S. 206, 217; People v. Cahan (1955) 44 Cal.2d 434, 448; Oaks Studying the Exclusionary Rule in Search and Seizure (1970) 364 U.S. 2364 U.S. 206, 217; People v. Cahan (1955) 44 Cal.2d 434 448; Oaks Studying the Exclusionary Rule in Search and Seizure (1970)

37 U.Chi.L.Rev. 665, 668-671 [hereinafter cited as Oaks].)

Third, exclusion of unlawfully seized evidence has been deemed necessary to preserve the judicial integrity of the court before which the defendant is being tried. (E.g., Lee v. Florida (1968) 392 U.S. 378, 385; Terry v. Ohio, supra, 392 U.S. 1, 12; Elkins v. United States, supra, 364 U.S. at 222; Olmstead v. United States (1928) 277 U.S. 438, 470, 484-485 (Holmes and Brandeis, J.J., dissenting); see generally Note, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary rule (1973) 20 U.C.L.A. L.Rev. 1229.)

This Court has repudiated the personal right theory. "The purpose of the

exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker (1965) 381 U.S. 618, 637." (United States v. Calandra, supra, 414 U.S. at 347, accord, United States v. Peltier, supra.) It remains to be considered whether the purposes of deterrence or judicial integrity would be served by the exclusion of evidence in this case.

Before applying the exclusionary rule, a remedial device not expressly mentioned in the Fourth Amendment, this Court--or any court--must balance its costs against its benefits. (See United States v. Calandra, supra, 414 U.S. at 348-351; Kaplan, The

Limits of the Exclusionary Rule (1974) 26 Stan.L.Rev. 1027, 1032-1035.) Typically the competing interests are the value to society of deterring future police misconduct and the cost of freeing without punishment a defendant whose guilt can be proven by the suppressed evidence. (Note, 20 U.C.L.A. L.Rev., supra, at p. 1149.) When the cost is greater than the benefit, the evidence is not excluded (United States v. Calandra, supra.) It is therefore necessary to assess the deterrent effect of the exclusion of the evidence in this case. "Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." (Michigan v. Tucker, supra, 417 U.S. 433, 446.)

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (Id. at 447; accord, Brown v. Illinois, supra, 422 U.S. at 612 (Powell, J., concurring); United States v. Peltier, supra, 422 U.S. at 537-539.)

Petitioner submits that United States v. Peltier, supra, provides compelling authority for the proposition that the deterrence rationale could not possibly be served in this case. In Peltier, government agents had conducted a species of search

subsequently condemned by this Court in Almeida-Sanchez should apply to searches conducted before the decision in that case. Holding that no useful purpose could be served by a retroactive application of Almeida-Sanchez, this Court made the following observations which are virtually controlling in the case at hand:

> "It was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval, that border patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that Almeida-Sanchez was the first roving border patrol case to be decided by this Court, unless we are to hold that parties may not

reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. [Citations omitted.] If the purpose of the exclusionary Rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Admittedly this uniform treatment of roving border patrol searches by the federal judiciary was overturned by this

Court's decision in Almeida-Sanchez. But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car." (422 U.S. at 541-543; emphasis added; footnotes omitted.)

It should also be noted that the Dixon curfew ordinance has been judicially approved, as the statute had been in Almeida-Sahcnez. Officer Rocha's reasonable and goodfaith reliance upon his understanding of the

Dixon ordinance totally undermines any attempt to rationalize the suppression of evidence on the grounds of deterrence. "Police conduct authorized by a statute which may be unconstitutional, will not be deterred . . . because the police cannot foresee which of the statutes that govern their conduct will be invalidated in the future." (Note, 47 N.Y.U.L.Rev., supra, at p. 604.) Therefore, deterrence of future unlawful police conduct, the exclusionary rule's "prime purpose" (United States v. Calandra, supra, 414 U.S. at p. 347), will not be served by suppression in this case.

Justice Powell has described an arrest under a statute subsequently declared unconstitutional as a mere "technical" violation of the Fourth

Amendment. In such a situation, "the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence." (Brown v. Illinois, supra, 422 U.S. at 612 (concurring opinion).) Just as an officer who has made a reasonable mistake of fact should not be penalized by the application of the exclusionary rule (Hill v. California, supra, 401 U.S. 797, 804), so also should he not be penalized when he has reasonably but mistakenly relied on his understanding of the law under which he has made an arrest.

Ideally, police should be encouraged to rely on the coordinate branches of government whenever possible while "engaged in the often competitive

enterprise of ferreting out crime." (Johnson v. United States, supra, 333 U.S. 10, 14.) Typically, police are asked to rely upon the assessment of the judiciary in determining whether probable cause exists to conduct a search. (E.g., United States v. Ventresca (1965) 380 U.S. 102.) In this case the officer relied upon the declared validity of the legislative determination that the facts which he perceived amounted to an offense against society. (In re Nancy C., supra, 28 Cal.App. 3d 747.) Suppression of evidence seized under authority of a warrant later invalidated will not deter police misconduct (cf. Brown v. Illinois, supra, 422 U.S. 590 [Powell, J., concurring]); the same must be said of temporary detention based on an officer's good faith

mistake of law, and for the same reason. The officer's reasonable and good faith mistake of law is not misconduct. Indeed, to the extent that the purposeless suppression of evidence causes confusion among the police it discourages such reliance, and the exclusionary rule therefore has a negative impact upon law enforcement and civil liberties.

The final rationale for the exclusionary rule is the "imperative of judicial integrity." Many things may be said about this nebulous concept, few of them favorable. It is inconsistent with other Fourth Amendment precedents in several respects. First, a defendant illegally arrested--even kidnapped--may be validly convicted despite the unlawful nature of his seizure. (Gerstein v. Pugh (1975) 420 U.S. 103, 119; Frisbie v. Collins (1952) 342 U.S. 519;

Oaks, supra, at 669.)

Second, evidence seized unlawfully by private citizens is admissible in a criminal trial. (Burdeau v. McDowell (1921) 256 U.S. 465.) Third, illegally obtained evidence may be used to impeach a witness, including the defendant. (Walder v. United States (1954) 347 U.S. 62; cf. Harris v. New York (1971) 401 U.S. 222.) Fourth, and fifth, both the doctrines of "attenuation" (Wong Sun v. United States (1963) 371 U.S. 471, 487-488) and harmless error (Chapman v. California (1967) 386 U.S. 18) are applicable to illegally seized evidence. For other examples where illegally seized evidence may be used in court without violating the concept of judicial integrity see In re Martinez (1970) 1 Cal.3d 641,

650; People v. Hayko (1970) 7 Cal. App.3d 604, 610; People v. Rafter (1974) 41 Cal.App.3d 537, 560-561; In re Christopher S. (1978) 80 Cal. App.3d 903.

Thus, a court may permit its integrity to be compromised as long as it does not prejudice the defendant, thus confusing his rights with its obligations. (See Kaplan, 26 Stan.L. Rev., supra, at 1030.) Finally, even this Court's decision to hold prospective in application the cases of Mapp v. Ohio, supra, 367 U.S. 643 and Linkletter v. Walker, supra, 381 U.S. 618 "in effect, ratified police violations of the Fourth Amendment occurring after that amendment was made applicable to the states through the Fourteenth Amendment [in Wolfe v.

Colorado]." (Note, 12 Amer.Crim.L. Rev., supra, at 514.)

Not only have the exceptions undermined the rule, but the concept itself, which has never been invoked by the United States Supreme Court as the sole justification to suppress evidence (Oaks, supra, at p. 669), rests upon a questionable view of the judicial process and its responsibility to society. "The weakness of the judicial integrity argument is that it asks us to be guided by what seems like judicial squeamishness; or, failing that, it asks us to engage in speculation about the remote consequences of judicial complicity in lawless governmental action." (Schrock and Welsh, 59 Minn.L.Rev., at p. 265.) Viewed as an end in itself, judicial integrity permits a court to

protect its purity by suppressing truth and permitting a guilty defendant to go free. "Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?" (Barrett, Exclusion of Evidence Obtained by Illegal Searches--A Comment on People v. Cahan (1955) 43 Cal.L.Rev. 565, 582.)

If suppression of illegally seized evidence is seen as a method of teaching by example (Olmstead v. United States, supra, 277 U.S. 438, [Brandeis, J., dissenting]) or of "minimizing the risk of seriously undermining popular trust in government" (United States v. Calandra, supra, 414 U.S. at 357 [Brennan, J., dissenting]), then the justification for judicial integrity is

speculative. "If proponents of the exclusionary rule say judicial lawlessness is a societal menace, the rejoinder is, why not risk that menace rather than the far worse danger of lawlessness in the street?" (Schrock and Welsh, 59 Minn.L.Rev., supra, at 266.)

A more fundamental objection to the doctrine than its dubious premises is its questionable legal foundation. Petitioner has searched the Constitution in vain for the provision which entitles this Court to instruct all other tribunals to defend their integrity by excluding relevant evidence. Of course, this Court, like the United States Supreme Court, has inherent supervisory power to direct its lower courts to abstain from participating in the "dirty business" of police misconduct. (Cf.

McNabb v. United States (1943) 318 U.S. 332; see generally Hill, The Bill of Rights and The Supervisory Power (1969) 69 Colum.L.Rev. 181, 193-199.) Indeed, in McNabb, one of the earliest cases to invoke the supervisory power, the court stated that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willfull disobedience." (318 U.S. at 345, emphasis added.) It is significant that the italicized language, having the ring associated with the invocation of the doctrine of judicial integrity, is found in a decision which is so closely identified with the concept of supervisory power.

There is also reason to question the continuing validity of the "judicial integrity" doctrine as a ground for suppressing evidence. Thus, the dissenters in Calandra feared that "the Court today discounts to the point of extinction the vital function of the rule that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct." (414 U.S. at 360.) The majority's implicit premise that deterrence and judicial integrity are inextricably intertwined (Id. at 356, n. 11) was expressly stated in Michigan v. Tucker, supra, 417 U.S. 433, 450, n. 25: "This ratione [of judicial integrity], however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide

an independent basis for excluding challenged evidence." Thus, judicial integrity has been subsumed in the more plausible rationale of deterrence. Despite references to judicial integrity by the majority in Peltier, supra, 422 U.S. at 537, and the hopeful endorsement by the dissenters (Id. at 533, n. 13), it should now be clear that the only viable purpose of the exclusionary rule is to deter unlawful police conduct.

To the extent that the imperative of judicial integrity is viable at all, Peltier makes it clear that it does not compel suppression of evidence in this case. That rationale "is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the

search and seizure have held that the conduct of the type engaged in by law enforcement officials is not permitted by the Constitution." (Id. at 539.)

It must also be noted that the imperative of judicial integrity is more than adequately protected in cases where the officer has made a reasonable mistake of law, in that a full judicial hearing must be conducted on this issue before such a finding can be made.

Thus, the courts are afforded an opportunity of protecting their own integrity.

Petitioner therefore submits that given the good faith and reasonable reliance by Officer Rocha upon the declared validity of the Dixon curfew ordinance, it is manifest that judicial integrity would not be offended by the admission of the fruits of the search into evidence.

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## CONCLUSION

For the foregoing reasons, it is respectfully requested that the instant application for writ of certiorari be granted.

Respectfully submitted,

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6-5-80

# APPENDIX A

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| THE PEOPLE, | ) | |
| | ) | |
| Plaintiff and Appellant, | ) | |
| | ) | |
| v. | ) | Crim. 20497 |
| | ) | |
| ROBERT JOSEPH TERESINSKI, | ) | Super. Ct. No. 5749 |
| | ) | |
| Defendant and Respondent. | ) | |
| | ) | |

The People appeal from an order dismissing charges of robbery. The dismissal follows an earlier order suppressing evidence obtained as a result of the search of defendant's car.

As we shall explain, a police officer, lacking an objectively reasonable basis for suspecting criminal activity, detained defendant's car. Consequently that detention violates

the Fourth Amendment, and both physical evidence of the robbery found in the car and identification testimony procured by exploitation of the illegal detention cannot be admitted into evidence. Because no admissible evidence remained to link defendant to the robbery, we affirm the trial court's order dismissing the charges.

About 2 a.m., Officer Rocha of the Dixon police force saw an unfamiliar car with three occupants proceeding through the city business district. Because of windshield glare he could not see defendant, the driver, but he thought both passengers were juveniles and surmised that the driver also was a minor. Although the car was proceeding at a lawful speed without any suspicious behavior, the officer signaled the driver to

stop. He subsequently explained that he detained the car because "I believed they were juveniles in the car. We have a 10:00 o'clock curfew in Dixon."

As the car slowed to a stop Officer Rocha observed defendant and the front-seat passenger glance back and reach down. Those gestures led him to believe that the occupants might be hiding alcohol or reaching for a weapon. Defendant alighted from the car, walked toward the police vehicle, and presented his driver's license. The license verified defendant's adult status, and in fact only one occupant of the car was a juvenile.

Rocha told defendant to stay at the rear of the car, walked to the driver's window, and shined his light on the floorboard. He saw a pool of liquid

and a beer can under the front seat. Ordering the two passengers out, he then observed a gun holster; and, after questioning, Rocha retrieved a loaded weapon from the fllorboard.[1/]

A subsequent search of the car produced several beer containers, a baggle of marijuana, and a paper bag filled with bills and change. The money was traced to a Seven-Eleven store that had been robbed earlier that night in nearby Woodland. Defendant and his two passengers were arrested on suspicion of robbery. Mr. Cady, the store clerk who witnessed the robbery, identified photographs of defendant and his companions.

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1/ The issues in this case concern the legality of the initial detention. The scope of the search has not been questioned. (Cf. People v. Superior Court (1970) 3 Cal.3d 807.)

Later at the preliminary hearing Cady identified defendant in person.

The trial court ruled that the detention was illegal and granted a motion to suppress, as the fruits of an illegal detention, the physical evidence found in the car, the photographic identification, and the subsequent courtroom identification. Since there remained no evidence linking defendant with the robbery, he ordered the charges dismissed; the People appealed.

We recently defined the constitutional standard for measuring the validity of a detention. In In re Tony C. (1978) 21 Cal.3d 888, 893, we stated: "to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing

him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (1) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience [citation omitted], to suspect the same criminal activity and the same involvement by the person in question."

We need only apply that standard to the facts of the present case. The detention here rested upon Officer Rocha's suspicion that defendant and his comrades were violating a city curfew

ordinance.[2/] Contrary to Officer

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2/ The ordinance reads

"Sec. 16.2 Curfew -- Minors not to be in public after 10:00 P.M.; exceptions.

"It shall be unlawful for any person under the age of eighteen years to loiter, idle, wander, stroll, or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, or other public grounds, public places and public buildings, places of amusement and eating places, vacant lots, or other unsupervised places, between the hours of 10:00 P.M. and 5:00 A.M. of the day immediately following; provided, however, that the provisions of this section do not apply when the person is accompanied by his parent, guardian, or other adult person having the care and custody of the person, or when the person is returning directly home from a meeting, entertainment, recreational activity or dance, or when the person is going directly to or returning directly from work.

"A person under eighteen years may obtain food in a cafe after a meeting, entertainment, recreational activity, dance or work after the hour of 10:00 P.M., but must vacate the premises immediately after consuming the food served and proceed directly home." (Ord. No. 6, 1950, § 1.) (continued)

Rocha's statement, the ordinance does not declare it a crime for minors to be found in public after 10 p.m. It provides that it is unlawful for a minor "to loiter, idle, wander, stroll, or play in or upon the public streets" and other public places between 10 p.m. and 5 a.m. These terms cannot reasonably be construed to encompass defendant's conduct.

The word "loiter" in particular bears a sinister connotation: it connotes lingering for the purpose of

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Footnote 2 continued.

"Sec. 16.4 Curfew -- Minors under eighteen violating curfew regulations.

"Any person under the age of eighteen years violating the provisions of section 16.2 shall be guilty of a misdemeanor and shall be dealt with in accordance with juvenile court law and procedure. (Ord. No. 6, 1950, § 3.)"

committing a crime. (In re Cregler (1961) 56 Cal.2d 308, 312.) As the court noted in People v. Horton (1971) 14 Cal.App.3d 930, 933: "driving along city streets, even at 1:15 in the morning, is not 'loitering.'" Whether or not the terms "idle, wander, stroll, or play," when used in a curfew ordinance, also carry a sinister connotation, those terms are equally inapplicable to the present case. Conceivably one may "idle, wander," or "play" in an automobile, but merely driving along a street in a lawful manner cannot be so described.

In sum, Officer Rocha lacked any objectively reasonable basis to suspect that defendant or his passengers were violating the prohibitory language of the ordinance. Accordingly, his detention of defendant was unlawful under

the standards established in In re Tony C., supra, 21 Cal.3d 888, 893.

Although the People have conceded before this court that defendant's conduct did not violate the curfew ordinance, they nevertheless argue that the detention should be upheld on the ground that the officer's action was based on a "reasonable mistake of law." (Cf. Hill v. California (1941) 401 U.S. 797 (mistake of fact); Elder v. Bd. of Medical Examiners (1966) 241 Cal.App.2d 246.) Courts on strong policy grounds have generally refused to excuse a police officer's mistake of law. (See, e.g., People v. McKelvy (1972) 23 Cal.App.3d 1027, 1036-1037.) We need not decide, however, whether under exceptional circumstances an officer's reasonable mistake of law might validate police

conduct because in this case the officer's mistake cannot be found reasonable.

The curfew ordinance did not present an obscure or unfamiliar enactment to Officer Rocha, but one that he had enforced on numerous occasions. The plain language of the ordinance clearly does not prohibit a minor from simply being present on the streets of Dixon after 10 p.m., but only prohibits such behavior as "loitering" or "idling" on the streets; the officer's belief that Dixon had enacted a blanket curfew ordinance should have been dispelled by a simple reading of the terms of the enactment. Moreover, several years before the detention in the present case, the Court of Appeal in construing a similar ordinance explicitly held that

driving a car at a normal rate of speed down a public street did not violate the ordinance. (People v. Horton, supra, 14 Cal.App.3d 930.) If we were to find Officer Rocha's mistake of law reasonable under these circumstances, we would provide a strong incentive to police officers to remain ignorant of the language of the laws that they enforce and of the teachings of judicial decisions whose principal function frequently is to construe such laws and to chart the proper limits of police conduct.

Finally, the Attorney General contends that even though the illegality of defendant's detention bars use of physical evidence found in his car, the lower court erred in suppressing the Seven-Eleven clerk's identifications of defendant as participant in the robbery.

The Attorney General further argues that the identifications alone established probable cause and that the order of dismissal therefore should be reversed.

The issue congeals into whether the identification evidence was obtained by "exploitation" of the illegal detention "or instead by means sufficiently distinguishable to be purged of the primary taint." (Wong Sun v. United States (1963) 371 U.S. 471, 488.) In People v. Sesslin (1968) 68 Cal.2d 418, 428, we explained that "to remove the taint from evidence obtained directly as a result of unlawful police conduct requires at least an intervening independent act by the defendant or a third party which breaks the casual chain linking the illegality and evidence in such a way that the evidence is not in fact

obtained by 'exploitation of that illegality.'"

We find no intervening act in the present case. The officer followed the initial detention with a visual search of the interior of defendant's car--a search that was illegal because of the illegality of the detention. That visual search led to a more thorough search, which turned up the proceeds of the Seven-Eleven robbery. Relying on that evidence, which we have determined to be the product of an illegal search, the officer arrested defendant and his companions for suspicion of robbery, took them into custody, photographed them, and sent the photographs to the Woodland police. Cady identified the photographs, and subsequently identified defendant in person. All events

followed in immediate, logical and casual progression, without any intervening act which could form a basis for finding that the taint of the illegal detention, search and seizure had been so attenuated that it did not infect the later identification testimony.

The Attorney General relies on cases which have permitted use of evidence illegally obtained in investigation of matters unrelated to the crime of which defendant is charged. (See People v. McInnis (1972) 6 Cal.3d 821; Lockridge v. Superior Court (1970) 3 Cal.3d 166; People v. Griffin (1976) 59 Cal.App.3d 532.) In each of those cases the defendant had been illegally arrested for an unrelated crime, weeks or months after the charged offense had been committed, and a search or mug shot made in

connection with the later unrelated arrest served to link defendant to the charged crime. The courts held the evidence admissible on the theory that it was not derived from exploitation of the illegality.

In the present case, defendant was arrested upon suspicion of the robbery of which he is now charged. As the trial court explained "This is not a case of independent agencies investigating independent crimes, nor of one agency investigating a crime and taking the defendant's photograph and then forwarding the photograph to another agency investigating a different crime. The investigation by both agencies related to the same robbery and the property taken therein. The investigations were each simultaneous and very closely related in

time as well as subject." Under these circumstances, we agree with the trial court that the identification testimony derived directly from exploitation of the physical evidence discovered as a result of the illegal detention.

The order of dismissal is affirmed.

TOBRINER, J.

WE CONCUR:

BIRD, C.J.
MOST, J.
NEWMAN, J.

COPY

PEOPLE v. TERESINSKI

Crim. 20497

I dissent. I would reverse the order of dismissal and direct the trial court to deny the motion to suppress evidence. In my opinion Officer Rocha did not lack an objectively reasonable basis for suspecting that defendant or his passengers were violating the Dixon curfew ordinance (§ 16.2, Dixon City Code). Even if the detention were unlawful, however, the Dixon police officer's conduct does not taint nor require the exclusion of the identification testimony of Colin Cady, the victim of the Woodland robbery, or the exclusion of the photographs taken by the Woodland police during defendant's booking on the robbery charges.

Circumstances short of probable cause to make an arrest may justify an officer stopping pedestrians or motorists for questioning. (In re Tony C. (1978) 21 Cal.3d 888, 892; People v. Harris (1975) 15 Cal.3d 384, 388-389; Cunha v. Superior Court (1970) 2 Cal.3d 352, 355; Irwin v. Superior Court (1969) 1 Cal.3d 423, 426-427; People v. Mickelson (1963) 59 Cal.2d 448, 450; People v. One 1969 Cadillac Coupe (1964) 62 Cal.2d 92, 95-96.) As stated in Tony C., the application of the rules is based on a determination of "'the reasonabneness in all the circumstances of the particular governmental invasion of a citizen's personal security' (Terry v. Ohio [1968] 392 U.S. 1, 19)." (21 Cal.3d at p. 892; emphasis added.)

In the present case there was an

abundance of objective facts that justified Officer Rocha's honest and strong belief that the occupants of the vehicle might be in violation of the curfew ordinance. (See In re Nancy C. (1972) 28 Cal.App.3d 747.) He observed a car he did not recognize, apparently occupied by juveniles, driving between 2 and 3 a.m. in the business district of a relatively small town. Although he knew that the curfew law contained a provision exempting juveniles traveling to or from "some lawful business or place or dance," he had no way of determining whether the exception applied without detaining and questioning the occupants of the vehicle. In light of the strong possibility that the exception did not apply, such detention and questioning was fully justified. In my opinion,

there can be no question of "the reasonableness in all the circumstances of the particular governmental invasion."

Even if Officer Rocha acted improperly in detaining defendant and his passengers in Dixon, however, only the physical evidence taken from the vehicle should be suppressed. There is no basis whatever for also suppressing the robbery victim's identification of defendant as the person who, with two companions, assaulted and robbed him in the 7-11 store in Woodland. That testimony of the victim Cady was obtained by means sufficiently distinguishable so as to be purged of the primary taint of any illegality that might possibly have inhered in the initial detention. (Wong Sun v. U.S. (1963) 371 U.S. 471, 487-488; Lockridge v. Superior Court (1970)

3 CA1.3d 166.) Moreover, since that testimony at the preliminary hearing was alone sufficient cause to hold defendant to answer for robbery, the trial court erred in dismissing the charges.

In ruling on the suppression motion, the trial court appled a "but for" test and suppressed not only the physical items found in the car but also all other evidence connecting defendant with the Woodland robbery: "In the case at bar, but for the illegal stop the property of the defendants would not have been seized, they would not have been arrested, their pictures would not have been taken, the witness Cady would not have identified them by name from the mug shots, they would not have been in court and Cady would not have made an in-court identification of them."

A determination, however, that the evidence would not have been obtained "but for" an antecedent illegal detention is only the start of the inquiry. Not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently fistinguishable to be purged of the primary taint.' . . ." (Wong Sun, supra, 371 U.S. at pp. 487-488.)

In Lockridge v. Superior Court, supra, 3 Cal.3d 166, 170, after determining that the challenged evidence

would not have been obtained "but for" illegal police conduct, this court nevertheless concluded that the police connection of defendant to the charged robbery through the illegal discovery of a gun was not sufficient to characterize the testimony of the victim of the robbery as "come at by exploitation of that illegality" (Wong Sun, supra, 371 U.S. at p. 488).

If the primary taint was purged in Lockridge, a fortiori it was also purged in this case. In Lockridge a gun was recovered during an unlawful search; the serial number of the gun led the police to the file of an unsolved robbery and to the victims of that robbery which had taken place two and a half years before; the victim identified photographs of the defendants and, after

robbery charges were filed, made a courtroom identification of them at the preliminary hearing. The trial court suppressed the gun but allowed the testimony of the witnesses.

There was no evidence in Lockridge that without the lead supplied by the gun the police investigation would have connected the defendants with the robbery. We nevertheless refused to characterize the victims' testimony as obtained by exploitation of the illegal police conduct. We reasoned that the victims were already known to the police as victims of the unsolved robbery; their gun was found as the result of a search in the course of an investigation of a totally unrelated crime; that search was not directed toward discovery of witnesses such as the robbery victims and it did

not lead to those victims as the source of further evidence of the crime the police were investigating when they illegally obtained the robbery victims' gun. We held that it was "pure happenstance" that during the investigation of another crime the police came across the gun taken in the robbery. We stated that the purpose of the exclusionary rule, to deter unlawful police conduct, was adequately served by suppressing the gun and the evidence of the other crimes the police were investigating: "That purpose would not be further advanced by suppressing the testimony of the known victims of the . . . robbery, testimony that unquestionably would have been admissible to establish petitioners' guilt of that crime, but for the chance disclosure of their connection therewith

during a wholly unrelated police investigation."

This court applied the same principles in People v. McInnis (1972) 6 Cal.3d 821 to permit the introduction into evidence of "mug shots" taken after an illegal arrest and used to secure a photographic identification of defendant for a robbery unrelated to the arrest. We held that the photographic identification and the in-court testimony of the robbery victims were not tainted by the previous illegal arrest. In McInnis, as in the instant case, two independent agencies were involved. As Justice Mosk pointed out, "The fact that a tenuous link was forged between the illegal arrest and the robbery is more clearly 'pure happenstance' in the case at bar than in Lockridge." (6 Cal.

3d at p. 825; see also People v. Griffin (1976) 59 Cal.App.3d 532.)

The circumstances of the present case are very similar to those of Lockridge. It was "pure happenstance" that in the course of the detention of defendant and his passengers for investigation of the curfew violation the Dixon police found the coins taken in the 7-11 robbery in Woodland. Officer Rocha was not looking for evidence of the robbery when he detained defendant; at that time Officer Rocha was unaware of the Woodland robbery.

The trial court in the instant case sought to distinguish Lockridge. The court said: "This is not a case of independent agencies investigating independent crimes, nor of one agency investigating a crime and taking the

defendant's photograph and then forwarding the photograph to another agency investigating a different crime. The investigation of both agencies related to the same robbery and the property taken therein. The investigations were each simultaneous and very closely related in time as well as subject." This analysis mischaracterizes the record.

The Dixon and Woodland Police Departments are independent agencies and they were investigating independent crimes, a possible curfew violation in Dixon and a robbery in Woodland. However, that independent agencies were involved is not the crucial factor; neither is the time span controlling. The thrust of Lockridge is that when a crime or, more precisely, victims of

crime become known to the police absent illegal conduct on their part and thereafter the defendant's connection with the crime is discovered by chance, the victim-witnesses are not tainted by the circumstances of the chance discovery.

An illustration of the tainting of a victim-witness is provided by People v. Huff (1978) 83 Cal.App.3d 549, where the record failed to establish that the police would have learned of the charged burglary and defendant's connection with it by means independent of a search which followed an illegal arrest for an unrelated robbery. Unbeknownst to the store owner in Huff, defendant left his shop with four suits. The owner checked the slacks rack after defendant left and satisfied himself that nothing was missing. He discovered the loss of

the four suits only after the police telephoned him and he went to the police department and was shown the four suits bearing tags from his store. "It is a matter of pure speculation whether Mr. Crosetti [owner] would have discovered his loss in the absence of the telephone call from the police. Even assuming that he would have discovered the loss at some point in time, it remained a matter of speculation whether he would have connected defendant with that loss and whether he would have reported the loss to the police." (83 Cal.App.3d at p. 561.)

In the instant case, not only were the Woodland police cognizant of the 7-11 robbery; within minutes of the robbery they obtained the description of the robbers from Cady, the victim;

they also had the observations of a passerby who observed three young men leaving a car and entering the Woodland store at about the time of the robbery. The informant's description of the young men conformed with that given by Cady and the description of the vehicle conformed substantially with that of the vehicle driven by defendant. The information formed part of the bulletin that issued from Woodland just minutes after the Dixon stop and we cannot say, as we did in Lockridge, that without the lead supplied by the unlawful Dixon detention the police would not have connected defendant to the robbery in Woodland.

In any event, Lockridge is dispositive of the instant case insofar as the admissibility of Cady's testimony

is concerned. Likewise, McInnis is dispositive of the issue concerning the admissibility of the photographs and Cady's photographic identification of defendant.

The photo taken by the Woodland police is no more tainted by the unlawful detention than is Cady's testimonial evidence; both the photo/photo identification and the testimonial evidence result from the "pure happenstance" discovery of the defendant's connection with the Woodland robbery and here, as in Lockridge and McInnis, the purpose of the exclusionary rule would not be served by suppressing either item of evidence.

MANUEL, J.

WE CONCUR:

CLARK, J.
RICHARDSON, J.

# APPENDIX B

CLERK'S OFFICE, SUPREME COURT

4250 State Building

San Francisco, California 94102

March 20, 1980

I have this day filed Order _____

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_____REHEARING DENIED _____

In re: Crim. No. 20497,

People v. Teresinski,

Respectfully,

C. E. BISHEL
Clerk

# APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF
CALIFORNIA

Crim. No. 20497

| | | |
|---|---|---|
| THE PEOPLE, | ) | |
| | ) | |
| Plaintiff and Appellant, | ) | Appeal |
| | ) | |
| | ) | County Yolo |
| vs. | ) | |
| | ) | Superior Court |
| ROBERT JOSEPH TERESINSKI, | ) | No. 5749 |
| | ) | |
| | ) | |
| Defendant and Respondent. | ) | |
| | ) | |

The above-entitled cause having been heretofore fully argued, and submitted, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the ORDER OF DISMISSAL of the Superior Court of the County of Yolo in the above-entitled cause, IS hereby AFFIRMED.

I, _____, Clerk of the Supreme Court of the State of California,

do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 11th day of FEBRUARY, 1980.

(Seal)

Witness my hand and the seal of the Court, this 21st day of MARCH, 1980.

_____
Clerk

By_____
Deputy
C. E. SCHNEIDER